REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 136'B' OF 2008

(An Appeal arising from the Judgement of the Senior Resident Magistrate's Court at Kajiado

in Criminal Case No. 338 of 2007 [R. A. OGANYO, (MRS.), SRM)

ADAM OLE MORRIS.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant, **Adam Ole Morris**, was on 21st March 2007 charged with the offence of **robbery with violence** contrary to **Section 296 (1)** of the **Penal Code.** The particulars of the offence were that on 25th February 2007at Rombo Masai Reserve at Loitoktok, the appellant, jointly with others not before the court, robbed Mirriam Nebondeni of Kshs.46,200/= and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Mirriam Nebondeni. The Appellant pleaded not guilty to the charge. Although the trial court ordered the appellant released on bond pending the hearing of the case, the appellant was not able to raise the required bond. He was remanded in custody pending the hearing of the criminal case facing him.

Trial commenced on 24th July, 2007. The first witness, the complainant, Mirriam Nebondeni testified. After concluding her testimony, the prosecutor made an application pursuant to the provisions of **Section 214** of the **Criminal Procedure Code** for the amendment of the charge. Instead of the appellant being charged with the offence of **robbery with violence** contrary to **section 296 (1)** of the Penal Code, the charge was substituted so that the appellant was charged with the offence of **robbery with violence** contrary ***to* Section 296 (2*)*** of the **Penal Code**. When the new charge was read to the appellant, he pleaded not guilty to the charge. The hearing of the case proceeded on the new charge. The Prosecution did not recall the complainant to again adduce her evidence in light of the substituted charge. The trial magistrate did not explain to the appellant the legal options that were available to him including the legal

right recall the complainant in light of the new and more serious charge now facing him. Other witnesses adduced their evidence.

After the close of both the Prosecution's and the defence's case, the trial magistrate found that the charge against the appellant was established by the prosecution to the required standard of proof beyond any reasonable doubt on the basis of the evidence of identification and by the application of the doctrine of recent possession. The appellant was convicted and sentenced to death as is mandatory provided by the law.
The appellant was aggrieved by his conviction and sentence. He duly appealed to this Court against the said conviction and sentence. The appellant raised several grounds of appeal challenging his conviction on the said basis of the evidence of identification and by the application of the doctrine of recent possession.

However, at the hearing of the appeal, Mrs. Gakobo, learned State Counsel conceded to the appeal in light of the procedural irregularity regarding the manner in which the initial charge was substituted. Learned Counsel submitted that the appellant's right to fair trial was prejudiced when he was not given the option to recall the complainant who had already testified before the charge was substituted with the more serious offence of **robbery with violence** contrary to **section 296 (2)** of the **Penal Code**. She however urged the court to order that the appellant be retried in view of the strong evidence of identification which was adduced by the prosecution witnesses. She reiterated that an item which was stolen from the homestead of the complainant was recovered from the house of the appellant a few hours after the robbery. She submitted that the witnesses who testified in the now vitiated trial will easily be procured if the court orders a retrial.

On his part, while welcoming the concession of the appeal by the State, the appellant did not wish to be retried. He urged the court to discharge him in view of the fact that he had been in lawful custody since his initial arrest in February 2007.

We have carefully considered the material facts of this case and the applicable law. The State, correctly in our view, conceded to this appeal. The trial court fell in error when it failed to inform the appellant of his right under the law to recall a witness if the initial charge was substituted with a more serious one. The complainant (i.e. PW1) adduced her testimony on the basis of the initial charge of **robbery with violence** contrary to **Section 296 (1)** of the **Penal Code**. The appellant cross-examined the complainant on that basis. It did not matter that the evidence may have disclosed the more serious offence of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. Once the prosecution made the decision to substitute the charge with that of the more serious offence, the appellant was required to be informed of his legal right to recall the complainant to be further cross-examined in light of the new charge facing the appellant. The failure by the trial magistrate to inform the appellant of this right meant that the appellant's right to fair trial was seriously prejudiced. In the premises therefore, we allow the appeal and hereby set aside the conviction and sentence of the trial court.

The issue that remains for determination by this court is whether the appellant should be retired. The principles to be considered by this court in determining whether or not to order a retrial are well settled. In **Fatehali Manji v Republic [1966] EA 343** the Court of Appeal held that a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial. In general, retrial will only be ordered if it will serve the ends of justice.

In the present appeal, the appellant has been in lawful custody since February 2007. It is more than four years since the appellant was placed under such lawful custody.

Taking into consideration all the facts of this case, including the circumstances under which the alleged robbery was committed, we are of the view that it would not serve the ends of justice if the appellant is retried. Although the State has indicated that it would be in a position to procure witnesses in the case if retrial is ordered, we are of the considered view that the period which the appellant has been in lawful custody does not justify his retrial. It would constitute miscarriage of justice if the appellant is retried

after he has been in lawful custody for such a long period of time. We have also taken into consideration the value of the items that were stolen during the robbery. If there are any debts which the appellants ought to have repaid to the society as a result of the alleged crime, we are of the considered opinion that he has repaid them.

In the premises therefore, the Appellant shall not be retried. He is hereby discharged and ordered set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 24TH DAY OF MAY, 2011.

P. K. KARIUKI

J U D G E

L. KIMARU

J U D G E